SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1247

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL., *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

International Brotherhood of Electrical Workers, AFL-CIO, and Local Union 769, International Brotherhood of Electrical Workers, AFL-CIO, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-captioned case on December 11, 1968, and January 10, 1969, respectively.

Opinions Below

The opinion of the Court of Appeals is reproduced in Appendix A to this petition, and is reported at 405 F. 2d 159. The Decision and Order of the National Labor Relations Board, one member dissenting (R. 117-131)[1], is reproduced in Appendix B to this petition and is reported at 154 NLRB 839.

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[1] References to the pleadings reproduced in the certified record as Volume One are designated "R." References to the stenographic transcript of the hearing before the Board, filed in its entirety with the Court below and reproduced in the certified record as Volume Two, are designated "Tr."

Jurisdiction

The opinion of the Court of Appeals was entered on December 11, 1968 and the judgment on January 10, 1969. On February 28, 1969, Mr. Justice Douglas entered an Order extending the time for filing a petition for a writ of certiorari until April 10, 1969. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

Question Presented

A union and an employer in the construction industry are parties to an agreement relating to the subcontracting of work to be done at construction sites, an agreement expressly validated by the first proviso to Section 8(e) of the National Labor Relations Act, as amended. The agreement further provides that breach of the subcontracting clause will be sufficient cause for rescission of the agreement by the union. The question presented is whether the latter provision—allowing the union to elect to rescind the agreement in the event of a material breach by the employer, rather than exercise its settled right to institute a judicial proceeding to obtain a remedy for such breach—is a form of "coercion," i. e., in the nature of a strike or picketing, within the meaning of Section 8(b)(4)(ii) of the National Labor Relations Act; and whether the union's warning that the provision may be invoked, following the employer's breach of the subcontracting clause, also constitutes such "coercion," where it is unaccompanied by any work stoppage, picketing, withdrawal or refusal to refer employees to the employer, or threat of any of the above actions.

Statute Involved

Sections 8(b)(4)(ii)(A) and (B) and 8(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. § 151 et seq.) are reprinted in Appendix C hereto.

Statement

Ets-Hokin Corporation ("Ets-Hokin"), is an electrical and general contractor incorporated in California and doing business in several states (R. 46; Tr. 31). It has maintained

collective bargaining relationships with Petitioner IBEW and its locals since 1920 (Tr. 63). In 1962 and at all subsequent times here involved, Ets-Hokin was subject to agreements with IBEW Locals covering work at the sites of its various construction jobs, including the Glen Canyon, Arizona site, which provided in part as follows:

> "The Local Unions are a part of the International Brotherhood of Electrical Workers and any violation or annulment of working rules or agreements of any other Local Union of the IBEW, of the subletting, assigning, or transfer of any work in connection with electrical work to any person, firm, or corporation not recognizing the IBEW as the collective bargaining representative of this or any other such Local Union by the Employer, will be sufficient cause for cancellation of this agreement, after the facts have been determined by the International Office of the Union."

In October 1962, under a prime contract from the U. S. Bureau of Reclamation to construct an electrical powerhouse and transmission lines in Glen Canyon, Arizona, Ets-Hokin entered into a subcontract with Rose Construction Company, Phoenix Division ("Rose") to construct certain steel towers and other structures at the Glen Canyon site (R. 47; Tr. 87), even though Rose did not have an agreement with the IBEW, as required by Ets-Hokin's agreements with that union (R. 47; Tr. 282, 330). Rose paid his employees at rates lower than those paid to journeymen linemen under the IBEW Local 769 contract covering the area including the Glen Canyon site (Tr. 322, 305, 313), and less than those required to be paid pursuant to the Davis-Bacon Act, as amended (40 U.S.C. 276a). In fact, Rose was later found by the Bureau of Reclamation to have violated that statute (Tr. 325-326; IBEW Ex. 7).

During the period January-March 1963, the IBEW advised Ets-Hokin that it was violating its agreements—by subcontracting to Rose, which had no IBEW agreement, and by paying wages below the prevailing scales and standards at the Glen Canyon site (Tr. 88-95, 101). The undis-

puted record shows that Rose had deceived Ets-Hokin by pretending it had an IBEW agreement (Tr. 51, 53, 79, 136, 249-250, 294); otherwise, Ets-Hokin would not have considered Rose for the Glen Canyon project (Tr. 36, 79). Upon ascertaining the facts, *Ets-Hokin readily admitted it was in violation of its IBEW agreements,* and throughout this period it sought only a sufficient opportunity, which Petitioners afforded, *to correct the situation voluntarily* and amicably (Tr. 70-71, 156-157, 254-255). Ets-Hokin testified that its policy was to deal with union subcontractors, that it had always been a union contractor and it "propose[d] to stay that way for a number of reasons" (Tr. 78-79). In April 1963, Ets-Hokin terminated the subcontract to Rose under an agreed-upon settlement to pay $50,000 plus a generous allowance for equipment (R. 52; Tr. 273; Ets-Hokin Ex. 1-B). Ets-Hokin thereupon undertook the construction job directly, and performed the work in accordance with its agreement with IBEW Local 769 (Tr. 59).

All of Ets-Hokin's witnesses having dealings with representatives of the IBEW during this period testified without contradiction that no picketing or work stoppages occurred or were threatened at Glen Canyon or any other Ets-Hokin construction job, and that Petitioners made no threat, suggestion or demand to withdraw workers or to refuse referral of workers to the Glen Canyon or other Ets-Hokin construction jobs (Tr. 77-78, 147, 177-178, 225). The Board's decision contains no findings to the contrary (R. 118-125), and there is no finding that the IBEW in any way made a threat of "no contract—no work" (R. 131; dissenting opinion of Board Member Fanning). Indeed, the Trial Examiner expressly refrained from making any such finding (TXD, R. 57, at fn. 9).

The Board construed the subcontracting portion of the quoted clause as applicable only to the construction site (R. 119-120; App. B at p. 19a) and upheld its validity under the following proviso to Section 8(e):

> "Provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating

to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ."

The Board also found, however, that the "termination" provision of the quoted clause was not saved by the foregoing proviso, and violated Sections 8(b)(4)(ii)(A) and (B) and 8(e) of the Act. The critical conclusion of the Board upon which these latter findings rests is that a contractual provision which merely permits the union party to a valid construction industry subcontracting agreement to rescind that agreement in the event of its breach is itself a form of coercion prohibited by Section 8(b)(4). The Board accepted—as it had to—the principle that construction industry subcontracting agreements may be enforced through lawsuits, but labeled the rescission provision a form of "self-help" falling within the area of unlawful "coercion." (R. 121; App. B, p. 20a). Thus:

> "Self-help is not judicial action, *even if a court or its equivalent might grant the same remedy for breach of contract* that one of the parties proposes to achieve unilaterally. Neither is the contract principle controlling, that is, one party to a contract breaches a material provision thereof, the other party may elect to rescind it." *Ibid,* (Emphasis supplied.)

Board Member Fanning dissented vigorously from the findings that Petitioners had violated Sections 8(b)(4)(ii)(A) and (B) and 8(e) of the Act. Replying to the principal conclusions of the majority, he accused them of "stretch-[ing] the type of coercion prohibited under Section 8(b)(4) beyond the limits intended by the Congress and interpreted judicially," citing *Sheet Metal Workers* v. *Hardy Corporation,* 332 F.2d 682 (5th Cir. 1964). Noting that, under *Hardy,* the IBEW had a right to file suit for specific performance of its contract or for damages for Ets-Hokin's breach, he concluded as follows:

> "Thus, *the controlling distinction is that between economic action, such as strikes, picketing, and other related conduct, on the one hand, and resort to recog-*

nized legal or judicial remedies for breach of contract on the other. Clearly, the IBEW lawfully could have filed suit for damages or specific performance for the breach of its agreement and, if the latter were ordered, obtained precisely the same result as it did herein. But another, long-accepted, remedy is available to a party to a contract when the other party commits a material breach of that contract. That remedy is the right to rescind the contract. As stated in *Corpus Juris Secundum,* 'On a material breach of the contract the injured party may elect to rescind the contract or to stand on it.' Certainly the articulation within the contract of this lawful right of election of remedies should not have the anomalous effect of rendering unlawful the exercise of that right, particularly where there is not the slightest evidence that the Congress, having granted specific contractual rights to employers and unions in the construction industry, then intended to deprive the parties to such agreements of the well-established remedies for breach of those very rights. I would find that the election of this remedy, like that of seeking judicial enforcement, is a lawful form of action and not a prohibited act of coercion under Section 8(b)(4)." (R. 130-131; App. B, at 33a. Emphasis supplied.)

On review, the Court below essentially adopted the reasoning of the Board majority and enforced the Board's decision and order. In pertinent part it found, as did the Board majority, that "a termination provision is clearly a means of economic pressure for enforcement." (App. A, p.8a.)

Reasons For Granting The Writ

The extent to which construction unions may contractually provide for established legal remedies—in this case for rescission—to enforce admittedly valid construction industry subcontracting agreements is an important and recurring question in the administration of the National Labor Relations Act which should be resolved by this Court; and the decisions of the Board and the Court below, holding

that a contractual provision for the right to rescind such an agreement is an unlawful form of "coercion" under Section 8(b)(4) of the Act, are in conflict with principles announced by this Court and other courts of appeals.

I

The question presented by the Petition involves the basic definitions of "coercion" under Section 8(b) (4) of the Act and of the scope of the construction industry proviso to Section 8(e). More specifically, the question is whether, in the Board's own language, the Board and the Court below were correct in concluding that a contractual provision for, or a warning of, rescission of the contract solely in order "to insure compliance with the subcontracting clause involved [was] *a form of economic pressure proscribed by the Act,* and that the clause was therefore unlawful as exceeding the limited exception of the construction industry proviso to sections 8(e)."[2] (Emphasis supplied.)

It is respectfully submitted that the holdings below distort the meaning of the statutory concept of "coercion" as interpreted by this Court. Over the years, the Court has had occasion to curb the Board's zest for expansive readings of the concepts of restraint and coercion as used in the Act. *NLRB* v. *Drivers Local Union No. 639,* 362 U.S. 274, 290-291 (1960); *NLRB* v. *Allis-Chalmers Manufacturing Company,* 388 U.S. 175 (1967). In *Allis-Chalmers,* the Court emphasized that the stautory phrases of "coerce" and "restrain" must be read as words of art, in the particular context of the specific Congressional purpose. Even more to the point here, the Court also observed that "court awards of damages against a contracting party for nonperformance of a contractual obligation voluntarily undertaken" would not be coercive within the meaning of the Act. 388 U.S. at 179-180.[3] Finally, the Court stated that a literal reading of the words "restrain" and "coerce"

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[2] Thirty-first Annual Report of National Labor Relations Board for the Fiscal Year ended June 30, 1966; U. S. Gov't. Printing Office, 1967, at 32.

[3] See also *Sheet Metal Workers Local 48* v. *Hardy Corp.,* 332 F. 2d 682 (5th Cir. 1964), discussed *infra* at pp. 14-15, 17.

will not be countenanced when to do so produces an absurd result:

> "Congressional meaning is of course ordinarily to be discerned in the words Congress uses. But when the literal application of the imprecise words "restrain or coerce" Congress employed in §8(b)(1)(A) produces the extraordinary results we have mentioned we should determine whether this meaning is confirmed in the legislative history of the section." 388 U.S. at 184.

Here, as in *Allis-Chalmers,* the pertinent legislative history reveals that the Congress did not intend the concept of "coerce" to cover the conduct in issue; the use of a contractual provision for rescission of a Section 8(e) subcontracting agreement in the event of its breach. Rather, the "specific union conduct" which is prohibited by Section 8(b)(4) is *economic pressure,* such as strikes and picketing, and that alone. Senator John F. Kennedy expressed this view of the means of enforcing construction industry proviso clauses:

> "Since the proviso does not relate to section 8(b)(4), *strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal* under section 8(b)(4) whenever the Sand Door case (357 U.S. 93) is applicable." II Legislative History of the Labor Management Reporting and Disclosure Act of 1959 (hereinafter "Leg. Hist."), 943-944 (G.P.O. 1959).

Similarly, Senator Goldwater had printed in the Congressional Record an analysis by Michael Bernstein, Minority Counsel for the Senate Labor Committee, stating in part:

> "But a building-trades union may enter into a contract with a contractor—building contractor—whereby he agrees that he will not let work to any subcontractor who is not union. This is not illegal. Now here is what it may do: The union may go into court and sue him if he fails to live up to that agreement. But *they cannot strike or picket him to make him live up to it,* which

is the law now'' (II Leg. Hist. 1829-1830. Emphasis supplied.)

Representative Thompson, a member of the Conference Committee, referring to the law prior to the amendments, stated, at II Legislative History 1707, as follows:

> ''The union becomes guilty of secondary boycott only if it goes on to put *economic pressure* upon the secondary employers, and under Section 8(b)(4)(A) *the pressure must be inducing the employees of the secondary employer to refuse to perform some of their normal services.*'' (Emphasis supplied.)[4]

Our conclusions with respect both to the limited nature of ''coercion'' prohibited by Section 8(b)(4) and the permissibility of rescission as a valid means of enforcing construction industry subcontracting clauses find additional support from the law review commentators. In Hickey, *Subcontracting Clauses Under Section 8(e) of the NLRA* 40 Notre Dame Lawyer 377 (1965), the author examined some of the ''legal radiations affecting the relations between the parties,''[5] arising from lawful construction industry subcontracting clauses, as follows (at pages 388-389):

> ''Section 8(b)(4)(B) allows an employer voluntarily to observe a construction proviso clause. . . .
>
> ''The union may also bring a lawsuit judicially to enforce its contract. The courts have held that such action does not constitute coercion for the purpose of Section 8(b)(4)(B) and will grant the union traditional remedies, such as specific performance, in order to obtain compliance by the employer. The next question, therefore, is whether the parties may provide a contractual remedy which obviates the need for court enforcement.
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> * * *
>
> ''Accordingly, then, it might be argued that other

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[4] See also the comments of Senator Curtis, II Leg. Hist. 989, and Representative Landrum, *Id.* at 1252.

[5] *Carpenters Local 1976* v. *NLRB (Sand Door Company)*, 357 U.S. 93, 108 (1958).

forms of contractual enforcement should be honored. Such a contract clause providing for self-enforcement is a termination clause which gives the union, in addition to other rights and remedies, the right to terminate or rescind the contract upon its breach. As noted by the Board in the *Amalgamated Lithographers, Local 78* (the *Miami Post* case), [130 NLRB 968] the 'right to terminate' clause is intended to give the union a remedy for breach of another clause, and its validity will depend on the validity of the other clause. Since the construction proviso clause is lawful, a clause which is intended to implement it is lawful also. If the clauses cannot be actually implemented, their validity standing alone is meaningless. *Since rescission is a normal contractual remedy and constitutes no greater form of coercion than specific performance, it cannot be said that the union has used unlawful means prohibited by Section 8(b)(4)(B).*" (Emphasis supplied.)[6]

This view, that construction industry subcontracting agreements may be enforced by *any* legal means, including contract rescission, short of traditional economic activity, also finds support in the *Amalgamated Lithographers* case[7] cited by Hickey, despite the Board's attempt to distinguish that case in its present decision. There, the Board had this to say concerning a cancellation clause:

> "As we have found that the 'struck work' clause is lawful, the 'right to terminate' clause intended to give the union a remedy for the breach of the former is equally lawful." 130 NLRB at 977.

Faced with the compelling nature of the test stated in the *Amalgamated Lithographers* case, the Board majority in *Ets-Hokin* attempted to distinguish the two cases by noting that, "That case *(Lithographers)* did not involve the construction industry proviso to Section 8(e) but a

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[6] See also Jones, *Specific Enforcement of "Hot Cargo" Provisions in Collective Bargaining Agreements by Arbitration and Under Section 301(a) of the Taft-Hartley Act*, 6 UCLA Law Review 85, 92-93 (1959).

[7] *Amalgamated Lithographers of America (Miami Post)*, 130 NLRB 968, enforced as modified 301 F. 2d 20 (5th Cir. 1962).

lawful, primary 'struck work' clause together with a 'right to terminate' clause giving the Union the right to terminate the contract in the event that the employer requested an employee to handle 'struck work.' "[8] In other words, a termination provision is permissible to enforce a lawful clause only when the clause supported is lawful because it is primary, and not when it is just as lawful by reason of an express exception created by the Congress because of its awareness of the special circumstances existing in the construction industry! The complete answer is found in the dissent of Board Member Fanning, who observed that:

> "The clear import of the Board's holding [*Amalgamated Lithographers*], quoted above, is that a termination clause is lawful whenever the clause which it supports is lawful, and it is wholly immaterial whether the latter clause is lawful because it is primary in nature or because it falls within the construction industry proviso and is thus excepted from the prohibition of Section 8(e)."[9]

Finally the decisions below also ignore the teachings of this Court in the *Sand Door* case, *supra* at n. 5, in which the Court held that an employer's agreement to comply with a pre-1959 "hot cargo" clause was not a violation of then Section 8(b)(4)(A) [now (B)], absent a strike by the union or its inducement of employees to engage in a strike. Mr. Justice Frankfurter first cautioned that Section 8(b)(4) "describes and condemns specific union conduct directed to specific objectives." 357 U.S. at 98. Then, noting that "a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees" (357 U.S. at 99), he spoke at length on the question of consent:

> "We do not read the words 'other person' in the phrase 'forcing or requiring . . . any employer or

[8] R. 120; Appendix B at p. 22a.
[9] R. 129; Appendix B at pp. 31a-32a.

other person' to extend protection from the effects of a secondary boycott to such other person when the secondary employer himself, the employer of the employees involved, consents to the boycott. When he does consent it cannot appropriately be said that there is a strike or concerted refusal to handle goods on the part of the employees. Congress has not seen fit to protect these other persons or the general public by any wholesale condemnation of secondary boycotts, since *if the secondary employer agrees to the boycott, or it is brought about by means other than those proscribed in Section 8(b)(4)(A), there is no unfair labor practice.*" 357 U.S. at 98. (Emphasis supplied.)

And:

"Of course if an employer does intend to observe the contract, and does truly sanction and support the boycott, there is no violation of Section 8(b)(4)(A). A voluntary employer boycott does not become prohibited activity simply because a hot cargo clause exists." 357 U.S. at 107.

Further:

"But *the Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice. Certainly the voluntary observance of a hot cargo provision by an employer does not constitute a violation of Section 8(b)(4)(A), . . .* It does not necessarily follow from the fact that unions cannot invoke the contractual provision in the manner in which they sought to do so in the present cases that it may not, in some totally different context not now before the Court, still have legal radiations affecting the relations between the parties. All we need now say is that the contract cannot be enforced *by the means specifically prohibited in Section 8(b)(4)(A).*" 357 U.S. at 108. (Emphasis supplied.)[10]

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[10] And, as more recently stated:

"Even on the doubtful premise that the words of Section 8(e) unambigu-

Subsequent to passage of the 1959 amendments to the Act—under which subcontracting provisions such as that here in issue were declared lawful—this Court again called attention to the dichotomy between consent and the specifically delineated forms of coercion prohibited under Section 8(b)(4). *NLRB* v. *Servette, Inc.*, 377 U.S. 46, 50-51 (1964). The same dichotomy and the principles announced in *Sand Door* and *Servette* apply with equal force to the request by Petitioners for compliance by Ets-Hokin with its commitments under its subcontracting agreements. And, as for the assumptions of the Board and of the Court below that rescission of Ets-Hokin's contracts would result in serious economic consequences to him, the answer is twofold: first, as noted above, there is nothing in the record to indicate a threat or prospect of picketing, a withdrawal of men from Ets-Hokin's projects or a subsequent refusal to refer them—the only types of coercion prohibited by Section 8(b)(4); second, it ignores completely Mr. Justice Frankfurter's admonition in *Sand Door* that Section 8(b)(4) "describes and condemns specific union conduct directed to specific objectives," 357 U.S. at 98, as well as the statement of this Court in *NLRB* v. *News Syndicate Company*, 365 U.S. 695 at 699-700 (1961) that:

> "Finally, as we said in *Local 357*, . . . we will not assume that unions and employers will violate the Federal law, . . . against the clear command of this act of Congress. As stated by the Court of Appeals, 'in the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives'."

In sum, under the principles announced by this Court in the cases cited above and the pertinent legislative history, the lesson to be drawn is that a variety of legal sanc-

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ously embrace the sentence of Rule 17, this does not end inquiry into Congress' purpose in enacting the Section. It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intentions of its makers.' Holy Trinity Church v. United States, 143 U.S. 457." *Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, at 619. See also Id. at 626-627. . .

tions—damages, injunction, specific performance, arbitration and the like—are available to enforce construction industry subcontracting agreements. Only traditional economic activity is prohibited, and only such economic activity may properly be held "coercion" under Section 8(b)(4).

II

In holding that the rescission clause here involved was a form of unlawful "coercion," the decisions of the Board and Court below also conflict with principles announced by other courts of appeals. The leading court of appeals decision is that of the Fifth Circuit in *Sheet Metal Workers Local 48* v. *Hardy Corporation*, 332 F.2d 682 (5th Cir. 1964). A construction union sued under Section 301 of the Taft-Hartley Act for a declaratory judgment, damages for breach, and a mandatory injunction to compel arbitration of a subcontracting clause within the coverage of the construction industry proviso. The District Court held the clause valid under Section 8(e) and issued a declaratory judgment, but denied the enforcement remedies sought. 218 F. Supp. 556 (N.D. Ala. 1963). The Fifth Circuit reversed. After reviewing the statutory language and the pertinent legislative history, discussed *supra* at pp. 8, 9, the Court said:

> ". . . It follows that the agreement here is exempted from the operation of § 8(e), and is thus valid and otherwise subsisting insofar as the Labor Act is concerned. It may not, however, be enforced by threats, coercion or restraint.
>
> "The reasoning applied by the District Court in denying judicial enforcement of the agreement was that such a course of action would amount to coercion within the contemplation of § 8(b)(4)(ii)(B), albeit through court processes and not a form of economic pressure or self help. Thus is the question presented.
>
> "While the authorities to sustain this or a contrary view are admittedly sparse, we are constrained to a view opposite that of the District Court. This will avoid the anomalous situation of an agreement, left valid

under one section of the Act but unenforcible by threat, coercion or restraint under another section, being rendered of little or no value by an interpretation of coercion to embrace the use of the courts. These sections were enacted concurrently and we think clear language would be necessary to convey a congressional intent that a party to an otherwise valid labor agreement may not turn to the courts for relief upon its breach.

* * *

"The District Court took the dictionary definition as its meaning in the Act and determined that it embraced judicial action. Barrows v. Jackson, 1953, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 and Shelley v. Kraemer, 1948, 342 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 116, 3 A.L.R. 2d 441, were also cited to demonstrate that legal action or court action amounts to coercion; there state action. Of course, it cannot be successfully urged that a court order or decree is not coercive, or that the mere filing of a suit and its prosecution is not likewise coercive in nature, but such an expansive interpretation of the term proves too much.

"*We believe that the Congress used 'coerce' in the section under consideration as a word of art, and that it means no more than non-judicial acts of a compelling or restraining nature, applied by way of concerted self help consisting of a strike, picketing or other economic retaliation or pressure in a background of a labor dispute.*" (pp. 684-686, Emphasis supplied.)

Similarly, in *Orange Belt District Council No. 48* v. *NLRB*, 328 F.2d 534, the District of Columbia Circuit observed that "threats" or warnings of a lawsuit are no less permissible than the actual bringing of a legal action to enforce a valid subcontracting provision. 328 F.2d at 536, n. 2. See also *Suburban Tile Center, Inc.* v. *Rockford Building and Construction Trades Council, et al.*, 354 F.2d 1 (7th Cir. 1965).

Since a suit for rescission, along with or in lieu of other contractual remedies, could not be contested, it is equally clear that a "threat" to take such action cannot be unlawful. In the instant case, it was unnecessary to file suit

because Ets-Hokin *conceded* that it was in violation of the subcontracting provision and stated that it *desired* to correct its violation.[11] A suit for rescission would simply have resulted in the declaration of the basic principle of contract law that an admitted material breach of an agreement by one party to a contract empowers the other party to elect to rescind. 17A C.J.S. *Contracts* Sec. 422(1), p. 521 (1963); Williston, Contracts, Secs. 683, 893(a) (Third ed.).[12] Clearly, had such a suit been filed (or threatened), and settled by compliance prior to trial, that action would have been lawful even under the Board's theory of the law. The instant case is not different in any material respect from that situation. Indeed, if a lawsuit to enforce the subcontracting clause is lawful, including the voluntary disposition of same before judgment, then *a fortiorâri* the voluntary compliance by Ets-Hokin achieved by Petitioners is lawful. As dissenting Board Member John Fanning correctly observed: "To label the right of termination a form of unlawful economic pressure is to beg the issue, rather than to answer it" (R. 130; App. B at p. 329).

III

As shown above, therefore, the decisions below, holding that the contractual provision for rescission and the warning that it would be utilized, followed by Ets-Hokin's compliance with the obligations of its agreement, were a form of "economic pressure" and amounted to unlawful "coercion" under Section 8(b)(4) of the Act, are contrary to the principles announced by this Court and by other courts of

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[11] Recall in this regard *Sand Door, supra.*

[12] Although the Board cavalierly dismissed references to the traditional contract remedy of rescission on the ground that it does not apply the law of private contracts, the fact is that the Board and the courts have for many years applied this contract principle in other contexts within the framework of the National Labor Relations Act. E.g., *United Electrical Workers* v. *NLRB. (Marathon Electric Co.)*, 223 F. 2d 338 (D.C. Cir. 1955), *cert. den.* 350 U.S. 981 (1956); *Boeing Airplane Co.* v. *NLRB*, 174 F. 2d 988 (D.C. Cir., 1949); *Boeing Airplane Co.* v. *Machinists Lodge 751*, 91 F. Supp. 596, aff'd. 188 F. 2d 356 (9th Cir. 1951), *cert. den.* 342 U.S. 821 (1951); *Neuffer* v. *Bakery Union*, 307 F. 2d 671 (D.C. Cir. 1962) (forfeiture clause). See also *Totton* v. *Local 43, United Association, etc.*, 402 F. 2d 270 (6th Cir. 1968), cert. den. 37 L. Week 3151 (Oct. 19, 1968).

appeals. Moreover, as the questions raised by those decisions involve the administration of a significant aspect of Section 8(b)(4) and the meaning and scope of the construction industry proviso to Section 8(e), one of the major additions to the Act in 1959, they are of great importance and require resolution by the Court at this time. Indeed, in *Sand Door, supra,* which itself became an important part of the legislative history underlying the enactment of Section 8(e), this Court noted that it granted certiorari in part, "because of the importance of the problem [concerning the meaning of Section 8(b)(4)(A)—now (B)] in the administration of the National Labor Relations Act, . . ." 357 U.S. at 97.

In *Woodwork Manufacturers Association* v. *NLRB.,* 386 U.S. 612 (1967), this Court traced the legislative history of the enactment of Sections 8(e) and 8(b)(4)(A) and the amendments to Section 8(b)(4)(B), 386 U.S. at 634-640. In the course of that examination, the Court noted the reasons for the Congressional exception granted in the construction industry proviso:

> "However, provisos were added to § 8(e) to preserve the status quo in the construction industry, . . . [T]he construction proviso . . . was intended . . . [as] a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there. . . ." 386 U.S. at 637-638.

In *Woodwork Manufacturers,* of course, this Court did not have occasion to examine Congressional intention concerning the means of enforcing construction industry subcontracting clauses, the issue presented herein. As noted above, however, it is now settled—following *Hardy* and *Orange Belt, supra*—that suits for damages, specific performance, rescission, etc., are permissible means of enforcing construction industry subcontracting agreements. Unions seeking to enforce such agreements may not always wish to do so in formal judicial proceedings, in view of the additional costs incurred and the problem of delay resulting

from crowded court dockets. The remaining question, therefore, and the one presented herein, is whether other types of remedies—purely contractual in nature—short of judicial proceedings, may be used. At present, unions and employers in the construction industry cannot be certain which, if any, contractual means of enforcement will be allowed. For example, in *NLRB* v. *Bricklayers Local 3*, 405 F.2d 469 (9th Cir. 1968), the union's proposed subcontracting clause was coupled with a provision for liquidated damages in the event of its breach. Both the Board and the Ninth Circuit held that the liquidated damages provision was not a mandatory subject of bargaining, even though intended as a means of enforcement of the lawful subcontracting clause.

It has now been ten years since passage of the 1959 amendments to the Act, including the adoption of Section 8(e) and the specific exemption therefrom granted to the construction industry. Yet, the full meaning and scope of that exemption is not yet clear, and will not be clarified unless this Court decides the issue. The uncertainty with respect to the permissible means of enforcing clauses validated by the proviso and the major importance of the issue affecting collective bargaining relationships throughout the construction industry are compelling reasons for the granting of the petition herein.

Conclusion

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21,407

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND ITS LOCAL UNION No. 769, *Respondents*.

On Petition to Enforce an Order of the National Labor Relations Board

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[December 11, 1968]

Before: HAMLIN, KOELSCH and BROWNING, Circuit Judges.

KOELSCH, Circuit Judge. This proceeding, commenced by the N.L.R.B. to enforce an order against the IBEW and its affiliated Local 769, concerns several of the secondary boycott provisions of the National Labor Relations Act, as

amended by the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 158.

Briefly, the trial examiner's findings, approved by the Board, were substantially as follows:

For many years the IBEW and its affiliated locals have maintained collective bargaining relationships with Ets-Hokin, a general and electrical construction firm. During the period covered by this proceeding Ets-Hokin was party to labor agreements with a number of IBEW locals relating to work on construction jobs throughout the United States, including one with Local 769, whose territorial jurisdiction extended over the U.S. Bureau of Reclamation Glen Canyon Dam project in Northern Arizona. All of them contained the following clause (or one essentially the same):

> "Local Union #_____ is a part of the International Brotherhood of Electrical Workers and any violation or annulment of working rules or agreements of any other Local Union of the IBEW, or the subletting, assigning, or transfer of any work in connection with electrical work to any person, firm, or corporation not recognizing the IBEW as the collective bargaining representative on any electrical work in the jurisdiction of this or any such Local Union by the Employer, will be sufficient cause for cancellation of this agreement, after the facts have been determined by the International Office of the Union."

In October 1962 Ets-Hokin subcontracted to Rose Construction Co. part of the electrical installation work on the Glen Canyon project. Soon afterward Rose entered into a collective bargaining agreement with a non-IBEW union which recognized that union as the representative of its laborers and provided wage scales below the minimum fixed

both in Ets-Hokin's bargaining agreement with Local 769 and its prime contract with the U.S. Bureau of Reclamation.

During the period from January through March 1963 Local 769 and the International (hereafter Respondents) repeatedly complained to Ets-Hokin concerning the subcontract, objecting particularly to the fact that Rose was dealing with a rival union and was paying sub-minimum wages. Pointing to the termination clause in their own bargaining agreements, Respondents threatened to terminate the Local 769 bargaining agent and assured Ets-Hokin that all other IBEW locals would do the same, unless Ets-Hokin immediately took Rose off the job. Ets-Hokin sought to effect some accommodation, but Respondents stubbornly refused, flatly rejecting all proposals and requests. When Respondents fixed a deadline Ets-Hokin capitulated and, after settling with Rose, undertook the work itself.

On these facts the Board concluded that Respondents violated sections 8(b)(4)(B), 8(e) and 8(b)(4)(A) of the National Labor Relations Act, 29 U.S.C. § 158. [*Ets-Hokin Corp.*, 154 N.L.R.B. 839 (1965)].

1. *The 8(b)(4)(B) Violation*

In pertinent part section 8(b) (4) (B) makes it an unfair labor practice for a union "to threaten, coerce or restrain any person engaged in commerce . . . where . . . an object thereof is . . . forcing or requiring any person . . . to cease doing business with any other person. . . ."

The trial examiner's finding that Respondents were seeking secondary boycott action is fully supported. Several witnesses gave testimony tending to show that Respondents demanded Ets-Hokin cease doing business with Rose; they also stated in substance that Respondents objected to a non-IBEW employer on the job; that Respondents flatly rejected all Ets-Hokin's requests to make some concession

that would enable Rose to hire IBEW members; that Respondents repeatedly declared Rose was ineligible for an IBEW agreement and warned Ets-Hokin that its own agreements would be terminated if Rose stayed.[1]

Likewise, we are satisfied that the evidence fully warrants the examiner's factual conclusion that Respondents' warning, in the circumstances of this dispute, constituted a threat prohibited by Sec. 8(b) (4).

"The statute in its present form deals with secondary boycotts and its provisions are not restricted to the use of force or violence as a means of bringing pressure against the secondary employer, but includes economic sanctions also." *N.L.R.B. v. Local 825, Int'l Union of Operating Engineers,* 315 F.2d 695, 697 (3d Cir. 1963). Nor are the latter limited to strikes and picketing. As the Supreme Court has said in *N.L.R.B. v. Fruit and Vegetable Packers, Local 760,* 377 U.S. 58, 68 (1964), "the prohibition of § 8(b) (4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise." Thus, even granting that the record is totally lacking in evidence direct or circumstantial that Respondents themselves would have followed the termination by economic action against Ets-Hokin, it does contain proof which if viewed realistically tends to show that termination would have set in motion a chain reaction attributable to them which had that effect. In a brief filed with the Board, Respondents, in arguing that it would be improper

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[1] Respondents contend that the reason they threatened to terminate the IBEW contracts was because Ets-Hokin had breached the obligation imposed by the Davis-Bacon Act (40 U.S.C. 276a) to make Rose pay the minimum wages prescribed in the prime contract. Although some evidence indicates that Respondents objected to the sub-minimum wages, substantial evidence supports the Board's conclusion that an object, if not the sole object of the threat was for a purpose proscribed by 8(b) (4). See N.L.R.B. v. Denver Bldg. & Trades Council, 341 U.S. 675, 689 (1951).

to infer that a strike action would follow termination of the agreement, said:

> "Because the so-called annulment clause contained in the IBEW's contract with Ets-Hokin was repeated in the union's agreements with other contractors, cancellation of the Ets-Hokin agreement would have immediately made that company an ineligible business associate in the eyes of these other contractors. Thus, whether or not the union continued to refer workmen to Ets-Hokin in a position where other contractors wishing to comply with their own IBEW agreements would not have made contracts with Ets-Hokin. Under such circumstances, there was no motivation for the union to take the strike action the General Council considers inevitable."

We are not impressed with Respondent's argument that cancellation could only "effect" Ets-Hokin as a subcontractor and, this being so, no adverse consequences could be infered even if the threat was carried out because the record showed only that during the initial period Ets-Hokin was a prime contractor for "numerous large U.S. or State governmental enterprises and numerous large private enterprises throughout the United States." Prime contractors, whose freedom to engage subcontractors is curtailed, suffer economically in much the same manner as subcontractors who are prevented from securing work.

2. *The 8(e) Violation*

Section 8(e) makes it an unfair labor practice for a union and an employer to enter into a secondary boycott agreement and declares such an agreement unenforceable and void; it contains two provisos, one of which, often referred to as the "construction industry proviso," excepts from the general operation of the section a secondary agreement in that industry which relates to on-site construction.

The Board recognized that the IBEW agreement was one in the construction industry and that the secondary boycott agreement therein related to the matter of on-site construction. But it nevertheless concluded that the terms of the agreement exceeded the scope of the proviso and to that extent was not saved. We agree.

In the so-called *Sand Door* decision [*Local 1976, United Brotherhood of Carpenters v. N.L.R.B.*, 357 U.S. 93 (1958)], the Supreme Court held that "hot cargo" agreements cannot be enforced by economic action prohibited by the then existing secondary boycott provision, section 8(b) (4) (A). But it pointed out that 8(b) (4) (A) did not prohibit all forms of union coercion calculated to compel a neutral employer to take secondary action against a primary employer. Rather it merely forbade a union to induce the neutral's employees to engage in a strike or refuse to handle the unfair employer's goods and left the union free to "approach an employer to persuade him to engage in a boycott. . . ." (357 U.S. at 99). Further, the Court noted that the law nowhere made secondary boycott agreements unlawful. In the Court's words: "the contractual provision . . . may . . . have legal radiations affecting the relations between the parties." (357 U.S. at 108).[2]

By means of the 1959 Landrum-Griffin Amendments Congress moved to close these "major loopholes in the present ban on secondary boycotts." (I Legis. Hist., Labor-Management Reporting and Disclosure Act of 1959 at 475 [hereinafter cited as Legis. Hist.]). It broadened the prohibition of 8(b) (4), making it an unfair labor practice for a union

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[2] "The *Sand Door* decision was believed by Congress not only to create the possibility of damage actions against employers for breaches of 'hot cargo' clauses, but also to create a situation in which such clauses might be employed to exert subtle pressures upon employers to engage in 'voluntary' boycotts." National Woodwork Mfgs. Assn. v. N.L.R.B., 386 U.S. 612, 634 (1967).

to approach a secondary employer with threats of labor trouble or other economic retaliation as well as to induce his employees to strike. Additionally, Congress moved directly against secondary boycott agreements and enacted section 8(e), which generally prohibited them.

In our view these 1959 amendments clearly reflect a Congressional attitude that unions should have no power over neutral employers to compel secondary action. And even though the construction industry proviso provided a limited relaxation of the general ban against secondary agreements, we are convinced that Congress did not intend to countenance provisions in such agreements that provide for enforcement by means of union coercion or economic pressure.

As we have said, the Supreme Court, prior to these amendments, had held that a union could not resort for enforcement to means prohibited by 8(b) (4) as it was then worded. Congress intended that this result should continue. In the Conference Report accompanying the Bill the committee explained: "The proviso applies only to section 8(e) and therefore leaves unaffected the law developed under section 8(b) (4)." I Legis. Hist. 943.

Furthermore, it appears that Congress intended to limit the enforcement of proviso-saved agreements to judicial means. The Conference Report stated: "It is not intended to change the law with respect to judicial enforcement of these contracts. . . ." I Legis. Hist. 943-44.[3] In light of the Congressional objective of limiting the enforcement of valid hot cargo agreements to judicial means and freeing the

[3] *See also* N.L.R.B. v. Int'l Bhd. of Elec. Workers, Local 683, 359 F.2d 385 (6th Cir. 1966); Building and Constr Trades Council v. N.L.R.B., 328 F.2d 540 (D.C. Cir. 1964); Orange Belt Dist. Council of Painters v. N.L.R.B., 328 F.2d 534 (1964) enf'd subsequent to Bd's dec. on remand, 365 F.2d 540 (D.C. Cir. 1966). N.L.R.B. v. Muskegon Bricklayers Union No. 5, 378 F.2d 859 (6th Cir. 1967); N.L.R.B. v. Local 217, United Ass'n of Journeymen, 361 F.2d 160 (1st Cir. 1966).

contractors from direct economic pressures to enforce such agreements, we agree with the Board that the construction industry proviso may not be read as permitting the inclusion of provisions into a collective bargaining agreement which purport to authorize 8(b) (4) violations.

Respondents contend that the termination clause does not authorize proscribed economic action but merely gives express recognition to the well established legal remedy of unilateral rescission, which arises upon a material breach of contract. Granted that unilateral rescission is a contract remedy, it does not follow that it is not a form of prohibited economic coercion. In an analysis of the Landrum-Griffin bill the then Senator Kennedy and Representative Thompson pointed out one of the evils of union self-help in enforcing a secondary boycott agreement: "the cost of noncompliance would undoubtedly be the [union's] insistence that the contract had been terminated, thus freeing the union to present new demands in collective baragining." (II Legis. Hist. 1708). Thus, viewed in the context of labor-management relations, a termination provision is clearly a means of economic pressure for enforcement.

3. *The 8(b)(4)(A) Violation*

Section 8(b) (4) (A), so far as pertinent, makes it an unfair labor practice for a union to coerce an employer to "enter into" an agreement prohibited by Sec. 8(e). In reaching the conclusion that Respondents violated this provision the Board, relying on its decisions in *Los Angeles Mailers Union No. 9,* 135 N.L.R.B. 1132, *enforced* 311 F.2d 121 (D.C. Cir. 1962) and *Dist. No. 9 Int'l Assn. of Machinists,* 134 N.L.R.B. 1354, *enforced* 315 F.2d 31 (D.C. Cir. 1962), reasoned that the phrase "to enter into" as used in the section included the reaffirmation of an existing agreement as well as its execution initially.

In *Mailers* the Board opined that the language, as well as the legislative history of the 1959 amendments, manifests a Congressional intention not only to prohibit all forms of hot cargo agreements but to render them utterly impotent as a means of applying economic pressure against secondary employers and that the phrase to enter into should be broadly construed to effect that goal. By way of illustration the Board noting Sec. 8(b) (4) (A) and the Congressional intention "to close the *Sand Door loophole* by, *inter alia,* making it unlawful for a labor union successfully to persuade an employer to 'live up to' a hot cargo agreement," the Board pointed out that:

> "To give the cited phrase the narrow meaning urged by the Examiner would, to a considerable extent, defeat the congressional intent to ban all forms of existing hot cargo arrangements. . . . [I]f an employer and a union agreed orally or in writing to a hot cargo arrangement during the 6 month preceding the filing of an unfair labor practice charge, they would clearly violate Section 8(e). On the other hand, under the holding of the Trial Examiner, if during the relevant 6-month period, the contracting parties only reaffirmed the continued validity of a hot cargo arrangement executed more than 6 months previously, as when a union persuades the employer to live up to such arrangements, there would be no violation of Section 8(e). It would seem that, from the standpoint of the public policy evidenced in the statute and the legislative history, a reaffirmation of an old hot cargo clause or the execution of a new hot cargo clause is equally bad. There is no legislative history to which we have been referred which indicates that Congress intended disparate treatment for substantially identical conduct." (135 N.L.R.B. at 1135-36).

We are persuaded by the Board's reasoning and convinced that its construction of the phrase is warranted. The D.C. Circuit has likewise approved the Board's rationale and in its opinion granting enforcement of the order has succinctly said: "To seek to give it [i.e., a hot cargo clause] life is in substance to seek to have it agreed to, which is no different in substance from seeking to have it entered into." *Los Angeles Mailers Union No. 9 v. N.L.R.B.*, 311 F.2d 121, 123 (D.C. Cir. 1962). At least two other Circuits have expressed like views: *N.L.R.B. v. Milk Wagon Drivers Union, Local 753*, 335 F.2d 326 (7th Cir. 1964); *N.L.R.B. v. Local 28 Sheet Metal Workers*, 380 F.2d 827 (2d Cir. 1967).

We are not unmindful that *Mailers* did not involve a construction proviso agreement but if, as we have concluded, construction agreements come within the ban of Sec. 8(e) when they provide for enforcement by proscribed means, then it appears to us that the Board's rationale is equally applicable to them.

The order will be enforced.

United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21,407

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND ITS LOCAL UNION No. 769, *Respondents*.

JUDGMENT

Before: HAMLIN, KOELSCH and BROWNING, Circuit Judges.

THIS CASE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondents, International Brotherhood of Electrical Workers, AFL-CIO, and its Local Union No. 769, their officers, agents, and representatives on August 31, 1965. The Court heard argument of respective counsel on October 11, 1967, and has considered the briefs and transcript of the record filed in this cause. On December 11, 1968, the Court being fully advised in the premises, handed down its decision granting enforce-

ment of the Board's order. In conformity therewith, it is hereby,

ORDERED AND ADJUDGED that International Brotherhood of Electrical Workers, AFL-CIO, and its Local Union No. 769, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Entering into, maintaining, giving effect to, or enforcing the termination and sympathetic aspects of the subcontracting clause found in their collective-bargaining agreements, to the extent found unlawful herein.

(b) Threatening, coercing, or restraining Ets-Hokin or any other person engaged in an industry affecting commerce to enter into an agreement prohibited by Section 8(e) of the National Labor Relations Act (hereinafter called the Act), or to cease doing business with Rose-Phoenix or any other person.

2. Take the following affimative action designed to effectuate the policies of the Act:

(a) Post at their business offices and meeting halls, in Phoenix, Arizona, copies of the attached notice marked "Appendix." Copies of said notice, to be furnished by the Regional Director for Region 28 of the National Labor Relations Board (Albuquerque, New Mexico), shall after being duly signed by the Unions' representatives be posted by the Unions immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Unions to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail to the Regional Director for Region 28, sufficient copies of said notice, to be furnished by him,

for posting by Ets-Hokin Corporation, if willing.

(c) Notify the Regional Director for Region 28, in writing, within 10 days from the date of this judgment, what steps have been taken to comply herewith.

Endorsed, Judgment Filed and Entered.

/s/ Wm. B. Luck

/A TRUE COPY

ATTEST: Wm. B. Luck, *Clerk/*

Appendix

NOTICE TO ALL MEMBERS

Pursuant To

A JUDGMENT of the United States Court of Appeals for the Ninth Circuit, enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

WE WILL NOT enter into, maintain, give effect to, or enforce the termination and sympathetic action aspects of the subcontracting clause found in our collective-bargaining agreement to the extent that such clause constitutes a contract or agreement, express or implied, with ETS-HOKIN CORPORATION, or any other employer, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in the products of any other employer, or to cease doing business with any other person.

WE WILL NOT threaten, coerce, or restrain ETS-HOKIN CORPORATION or any other person engaged

in an industry affecting commerce, as defined in the Act, where an object thereof is forcing or requiring ETS-HOKIN CORPORATION or any other employer engaged in an industry affecting commerce to enter into an agreement prohibited by Section 8(e) of the Act, or to cease doing business with Rose-Phoenix or any other person.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

(Labor Organization)

Dated_____ By_____
(Representative) *(Title)*

LOCAL UNION NO. 769, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO

(Labor Organization)

Dated_____ By_____
(Representative) *(Title)*

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Resident Office, 230 North First Avenue, Phoenix, Arizona 82025, (Tel. No. 261-3717), if they have any question concerning this notice or compliance with its provisions.

APPENDIX B

154 NLRB No. 52

D-7093
Phoenix, Arizona

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

No. 28-CA-939

ETS-HOKIN CORPORATION
and
R. D. NEILL, An Individual Proprietor
d/b/a ROSE CONSTRUCTION

No. 28-CA-945

ETS-HOKIN CORPORATION
and
LOCAL UNION No. 428, INTERNATIONAL
UNION OF OPERATING ENGINEERS, AFL-CIO

Nos. 28-CB-262
28-CC-137

LOCAL UNION No. 769, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
(ETS-HOKIN CORPORATION)
and
R. D. NEILL, An Individual Proprietor
d/b/a ROSE CONSTRUCTION

Nos. 28-CB-263
28-CC-138

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
(ETS-HOKIN CORPORATION)
and
R. D. NEILL, An Individual Proprietor
d/b/a ROSE CONSTRUCTION

Nos. 28-CB-264
28-CC-139

LOCAL UNION No. 769, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
(ETS-HOKIN CORPORATION)
and
LOCAL UNION No. 428, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

No. 28-CE-3

LOCAL UNION No. 769, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
and
R. D. NEILL, An Individual Proprietor
d/b/a ROSE CONSTRUCTION
and
ETS-HOKIN CORPORATION, Party to the Contract

Decision and Order

On February 4, 1964, Trial Examiner Eugene K. Kennedy issued his Decision in the above-entitled proceeding, finding that the Respondents had engaged in certain unfair labor practices alleged in the complaint and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Respondents filed exceptions to the Trial Examiner's Decision and briefs in support thereof. The Respondents also filed supplemental briefs in support of their positions. The General Counsel filed an answering brief and a supplemental memorandum in support of the Trial Examiner's Decision. The Respondents also requested oral argument. The request is denied as the record, including the exceptions and briefs, adequately present the issues and the positions of the parties.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial Examiner's Decision, the exceptions and the briefs, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations only to the extent consistent with our decision herein.

I. Section 8(e): Ets-Hokin's contract with IBEW Local 769 contains the following clause:

> The Local Unions are part of the International Brotherhood of Electrical Workers and any violation or annulment of working rules or agreements of any other Local Union of the IBEW, or the subletting, assigning, or transfer of any work in connection with electrical work to any person, firm, or corporation not recognizing the IBEW as the collective bargaining representative on any electrical work in the jurisdiction of this

> or any other such Local Union by the Employer, will be sufficient cause for the cancellation of this agreement, after the facts have been determined by the International Office of the Union.

The Trial Examiner found that the subcontracting clause violated the general proscription of Section 8(e) and was not protected by the construction industry proviso to that section. The clause has three separate aims, each of which we consider below: (1) to prevent subcontracting of electrical work in the jurisdiction of the contracting local except to a contractor having an agreement with the IBEW; (2) to allow the contracting local to terminate its contract if the employer violates the clause in its jurisdicion; and (3) to allow other IBEW locals to terminate their agreements if any local's contract has been breached.

A. *IBEW Subcontracts:* It is clear that the disputed clause violates the general proscription of Section 8(e). However, not all clauses that come within the proscriptions of Section 8(e) are prohibited. The first proviso to Section 8(e), reading:

> provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work; . . .

grants a limited exemption to the construction industry.

The Trial Examiner found that the instant clause did not come within the proviso because it did not expressly contain the statutory language. But the proviso, while exempting agreements which *relate to* construction work to be done on the jobsite, does not require a specific verbal

formula.[1] The Board has held that a contract not clearly unlawful on its face would be interpreted to require no more than what is allowed by law; it is not necessary that a questioned clause contain the precise language of the statute to be lawful.[2] If a clause is ambiguous, the Board in a Section 8(e) proceeding will not presume unlawfulness, but will consider extrinsic evidence to determine whether the clause was intended to be administered in a lawful or unlawful manner.[3]

At all times material to this case, Ets-Hokin has been engaged in electrical contracting in the building and construction industry. The contract itself is one which was entered into between the IBEW and the National Electrical Contractors of America. The scope of the agreement covers work normally done at the construction site, such as pole line construction, steel and metal construction, highway lighting systems, and electrical underground construction. Throughout the agreement the term "construction" appears frequently. It is clear that the contract provisions refer to construction work. It was also stipulated at the hearing that the contracting clauses are found only in contracts with the IBEW applicable to the construction industry and that Ets-Hokin was perfoming the type of work found in the contract. Upon the basis of the foregoing, we find that the subcontracting clause applies, and was intended to apply, only to on-site construction work.

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[1] *Paragon Products*, 134 NLRB 662 (1961); *Stackhouse Oldsmobile*, 140 NLRB 1239 (1963); *N.L.R.B.* v. *News Syndicate*, 365 U.S. 695 (1961); *Minnesota Milk*, 133 NLRB 1340 (1961); and *Pure Milk Association*, 141 NLRB 1237 (1963).

[2] *Paragon Products, supra*, footnote 1; *Stackhouse Oldsmobile, supra*, footnote 1. The Board relied on *N.L.R.B.* v. *News Syndicate*, where the Supreme Court approved a lower court's holding that "in the absence of provisions calling explicitly for illegal conduct, the contract cannot be illegal because it fails affirmatively to disclaim all illegal objects."

[3] *Ohio Valley Carpenters*, 136 NLRB 977, 986 (1962), and *Pure Milk Association, supra.*

B. *Termination:* The subcontracting clause which we have found to be lawful under the construction industry proviso to Section 8(e) was repeated in the bargaining contracts between the IBEW, its local, and contractors throughout the United States. By its terms, if a contractor violated provisions of the clause in a collective-bargaining contract wtih one local of the IBEW, he was subject to having his contracts with other IBEW locals cancelled. The effect in practical terms is thus described by Respondent IBEW in a supplemental memorandum submitted to the Board (at p. 6):

> Because the so-called "annulment" clause contained in the IBEW's contract with Ets-Hokin was repeated in the union's agreements with other contractors throughout the nation, the cancellation of the Ets-Hokin agreement would have immediately made that company an ineligible business associate in the eyes of these other contractors. Thus, whether or not the union continued to refer workmen to Ets-Hokin, the mere fact that the latter had no agreement with the IBEW would have placed Ets-Hokin in a position where other contractors wishing to comply with their own IBEW agreements would not have made contracts with Ets-Hokin. Under such circumstances, there was no motivation for the union to take the strike action the General Counsel considers inevitable.

In other words, by canceling its collective-bargaining contract with Ets-Hokin because of violation of the subcontracting clause, Local 769 could have practically forced Ets-Hokin out of business in the whole United States. The threat of contract cancellation was therefore a powerful private economic sanction to insure compliance with the subcontracting clause.

Both the Board and the courts have said that although

a contract within the construction industry proviso to Section 8(e) is exempt from the operation of that section, it may be enforced only through lawsuits and not by threats, coercion, or restraint proscribed by Section 8(b)(4)(B).[4]

The term "coercion" as used means "non-judicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing *or other economic retaliation or pressure in a background of a labor dispute.*" /Emphasis supplied./.[5]

Self-help is not judicial action, even if a court or its equivalent might grant the same remedy for breach of contract that one of the parties proposes to achieve ulilaterally. Neither is the contract principle controlling, that is, one party to a contract breaches a material provision thereof, the other may elect to rescind it.[6] We are not administering the law of private contracts. Congress has, as we read the legislative history, outlawed every form of private contract rendered permissible by the building construction proviso to Section 8(e).[7] Finally, we are not overruling the *Amalgam-*

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[4] *Muskegon Bricklayers Union No. 5,* 152 NLRB No. 38; *Sheet Metal Workers* v. *Hardy,* 332 F.2d 682 (C.A. 5); *Orange Belt District Council of Painters No. 48* v. *N.L.R.B.,* 328 F.2d 534 (C.A.D.C.).

[5] *Sheet Metal Workers* v. *Hardy, supra,* at p. 686.

[6] "We realize that this conclusion may leave the union with a valid contractual provision and with no means of enforcing it other than in a civil suit. We also realize the difficulty the building crafts have with the secondary boycott provision of the Labor-Management Relations Act, but this court is not the forum in which to seek relief from what the union characterizes as 'the shackles' of this statute." *Local 5, Plumbers* v. *N.L.R.B.,* 321 F.2d 366, 370 (C.A.D.C.).

[7] "Thus, although employers and unions who are under [the construction industry] exemption to [Section 8(e)] may lawfully enter into such agreements, and may resort to the courts for their enforcement under applicable principles of contract law, no coercion or restraint—economic or otherwise—may be used by any party to such agreement, even if entered into voluntarily by both parties, to compel the other party to live up to the contract or to refrain from breaching it." Memorandum by Senator Goldwater analyzing the new law. II Leg. Hist. Labor-Management Reporting and Disclosure Act of 1959 (U.S. Govt. Print. Office 1959), at 1858.

ated Lithographers (Miami Post) case,[8] as suggested by Member Fanning in his dissent. That case did not involve the construction industry proviso to Section 8(e), but a lawful, primary "struck work" clause together with a "right to terminate" clause giving the union the right to terminate the contract in the event that the employer requested an employee to handle "struck work." The Board said that since the "struck work" clause was lawful, the "right to terminate" clause intended to give the union a remedy for its breach was also lawful. There is no legislative history which shows a Congressional intent to limit to lawsuits the enforcement of a clause outside the reach of Section 8(e) without reference to its *proviso,* as in the *Amalgamated Lithographers* case. But there is such an intention manifested as to contracts which would be unlawful under Section 8(e) but for the construction industry proviso. By an exception, Congress has permitted in the construction industry certain contracts which would otherwise be unlawful under Section 8(e). But the exception is not unqualified. Congress has indicated clearly that, although lawful, these proviso contracts are not to be enforced by self-help. That is the point of difference between the *Lithographers (Miami Post)* case and the present one.[9]

Accordingly, we find that as the annulment provision of the termination clause involves a form of economic pressure proscribed by Section 8(b)(4)(B), it exceeds the limited

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[8] *Amalgamated Lithographers of America, (Miami Post),* 130 NLRB 968, 977, enfd. as modified 301 F.2d 20 (C.A.5).

[9] Indeed, in a hot-cargo or secondary boycott context, albeit not within the construction industry proviso to Section 8(e), the Ninth Circuit stated in a companion *Amalgamated Lithographers* case that the effect of a "termination" clause is to agree to a strike as "an ultimate sanction." *N.L.R.B.* v. *Amalgamated Lithographers of America (Ind.),* 309 F.2d 31, 39-42, enfd. 130 NLRB 985, cert. denied 372 U. S. 943. See Lesnick, *Job Security and Secondary Boycotts,* 113 U. Pa. L. Rev. 1000, 1013, footnote 55 (1965).

exemption of the construction industry proviso to Section 8(e) and is therefore unlawful.[10]

C. *Sympathetic Action*: As the local involved does not have the right to cancel its agreement to achieve an objective condemned by Section 8(b)(4)(B), *a fortiori,* another local not directly involved in the dispute would not have the right to terminate its contract with Ets-Hokin for a like objective. Accordingly, we find this feature of the clause unlawful under Section 8(e).

D. *Liability of Ets-Hokin*: The Trial Examiner predicated the liability of Ets-Hokin on his mistaken belief that the charges and complaint in Case No. 28-CE-3 named Ets-Hokin as a respondent. In view of the fact that neither the charge nor the complaint alleged a violation of Section 8(e) by Ets-Hokin, we reject the Trial Examiner's findings against it.

E. *The constitutionality of this section*: The contention that Section 8(e) is unconstitutional has been rejected by the Board. In the absence of a binding court order to the contrary, the Board must assume the constitutionality of the Act which it is required to administer.[11]

F. *Davis-Bacon defense*: This point was originally raised by the Respondent Unions as grounds for the cancellation with Ets-Hokin. Under the Davis-Bacon Act, the general contractor is responsible for his subcontractor's meeting the Davis-Bacon rates set in the contract. The Unions argue in substance that Ets-Hokin was subject to a government wage-standards subcontracting clause and that by subcontracting to Rose-Phoenix which did not pay Davis-Bacon

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[10] *Muskegon Bricklayers Union No. 5, supra.*

[11] *Amalgamated Lithographers, Local 78 (Miami Post),* 130 NLRB 968, footnote 3, (1961).

wages,[12] it breached its agreement. However, the facts do not support the Unions' contention that this was the sole, or even the main, reason for canceling the contract with Ets-Hokin, for the record establishes that the IBEW insisted that Rose-Phoenix be removed even after Ets-Hokin had agreed to pay the difference between the rates Rose-Phoenix was paying and the alleged Davis-Bacon rates.

II. Section 8(b)(4)(A) prohibits the use of proscribed means for an object of "forcing or requiring an employer . . . to enter into any agreement which is prohibited by subsection (e) of this section." In *Centlivre Village Apartments*[13] the Board reexamined its approach to this section and decided to adopt the view of various courts that the proviso to Section 8(e) is incorporated by reference into Section 8(b)(4)(A); hence an attempt by means condemned by Section 8(b)(4) to obtain such a clause which is lawful under the construction industry proviso falls outside the scope of Section 8(b)(4)(A). We have reviewed the Trial Examiner's finding of a Section 8(b)(4)(A) violation in light of our decision in *Centlivre*. Having found the termination and sympathetic action features of the clause unlawful under Section 8(e), notwithstanding the proviso, we do find, as did the Trial Examiner, that Respondents IBEW and Local 769 violated Section 8(b)(4)(ii)(A) in coercing Ets-Hokin to remove Rose-Phoenix from the Glen Canyon project, by threatening to enforce the termination clause in Local 640's[14] contract.[15]

III. Section 8(b)(4)(B): In *Centlivre Village Apartments, supra,* the Board held that coercion by a union to

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[12] A case on this point is *now* pending before the Department of Labor.

[13] 148 NLRB No. 93 (1964).

[14] The original contract was between Ets-Hokin and Local 640 of the IBEW, the predecessor of Local 769.

interrupt business relations between a neutral general contractor and an identified subcontractor came within the prohibition of Section 8(b)(4)(B). Here the Trial Examiner found that the Union, by threatening to cancel its contract with Ets-Hokin, forced Ets-Hokin to cancel its contract with Rose-Phoenix and thus violated Section 8(b)(4)(ii)(B) of the Act. We agree.

The Trial Examiner rested his findings that Local 769 shared equal responsibility with the International for the coercion on the ground that joint activity for a joint objective creates joint responsibility. Local 769 argues that coercion must be within the power of the person making the threat, and asserts that as it alone had no power to terminate the contract, a fact known by the parties, it may not be held responsible. It also argues that the Board has recognized that labor organizations are to be treated as legal entities and the mere fact that two labor organizations are affiliated is not sufficient without more to establish the responsibility of the local for the action of its parent organization.[16]

Local 769 is chartered by the International and is a successor to Local 640, also chartered by the International. Although the terms of employment are determined and negotiated by each local union, agreements must be submitted to the International for approval. In addition, agreements between the local and an employer in the construction industry must contain a clause declaring that the local is part of the IBEW and that an alleged violation of the subcontracting clause would be examined by the Interna-

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[15] *Los Angeles Mailers Union No. 9 ITU (Hillbro)* 135 NLRB 1132, 1136, enfd. 311 F.2d 121 (C.A.D.C.); and *District No. 9, International Association of Machinists (Greater St. Louis Automotive Trimmers)*, 134 NLRB 1354, 1359-1366, enfd. 315 F.2d 33 (C.A.D.C.).

[16] *Franklin Electric*, 121 NLRB 143 (1958).

tional to see if it is factually supported. Grievances are handled by the local, but the International participates in the final stages of the grievance machinery. The protest that led to the International's interest in this case was made by Local 769, and officers of the Local participated in the various meetings between Ets-Hokin and the International. Thus, the Local and the International shared a common objective of obtaining work for IBEW members who belonged to the Local, and the Local allowed the International to act for it so that strength would be added to its own position. We find that Local 769 and the International were acting in concert and both Unions are therefore jointly responsible for the unlawful coercion prohibited by Section 8(b)(4)(ii)(A) and (B).

IV. *Discriminatory Discharge*: The Trial Examiner found that the Respondent Unions and Ets-Hokin were responsible for the termination of the Rose-Phoenix employees, and that the terminations were violations of Section 8(a)(1) and (3) by Ets-Hokin and Section 8(b)(1)(A) and (2) by the Unions.

The "no subcontracting" contract provision has the following aspects: a prohibition against subcontracting on a building construction site, and an annulment clause. The first of these we have found to be lawful under the construction industry proviso to Section 8(e); the second we have found to be unlawful. These two aspects are, however, severable. The Unions had the right to insist, albeit not by proscribed means, that the Employer subcontract work only to IBEW subcontractors as required by the lawful part of the extant collective-bargaining contract. Accordingly, in terminating its contract with Rose-Phoenix because of the lawful requirement of its collective-bargaining contract with Respondent Union, Ets-Hokin did not discriminate against employees in violation of Section 8

(a)(3) and (1); and, in insisting that Ets-Hokin adhere to the lawful contract terms, Respondent Unions did not cause Ets-Hokin to unlawfully discriminate in violation of Section 8(b)(2) and (1)(A).[17]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, International Brotherhood of Electrical Workers, AFL-CIO, and its Local Union No. 769, their officers, agents, and representatives, shall take the following action:

1. Cease and desist from:

(a) Entering into, maintaining, giving effect to, or enforcing the termination and sympathetic aspects of the subcontracting clause found in their collective-bargaining agreements, to the extent found unlawful herein.

(b) Threatening, coercing, or restraining Ets-Hokin or any other person engaged in an industry affecting commerce to enter into an agreement prohibited by Section 8(e) of the Act, or to cease doing business with Rose-Phoenix or any other person.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at their business offices and meeting halls, in Phoenix, Arizona, copies of the attached notice marked "Appendix."[18] Copies of said notice, to be furnished by the Regional Director for Region 28, shall, after being duly

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[17] *International Brotherhood of Electrical Workers, Local 11 (T. A. Thornburgh Co.)*, 153 NLRB No. 67.

[18] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order".

signed by the Unions' representatives be posted by the Unions immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Unions to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail to the Regional Director for Region 28, sufficient copies of said notice, to be furnished by him, for posting by Ets-Hokin Corporation, if willing.

(c) Notify the Regional Director for Region 28, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint herein be, and it hereby is, dismissed insofar as it alleges that the Respondent, Ets-Hokin Corporation, violated the Act.

Dated, Washington, D. C.

FRANK W. MCCULLOCH, *Chairman*
GERALD A. BROWN, *Member*
HOWARD JENKINS, JR., *Member*
(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER FANNING, concurring in part and dissenting in part:

I join with my colleagues in dismissing the alleged violations of Section 8(a)(3) and 8(b)(2),[19] and in finding that

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[19] My agreement in this respect is based solely upon my conclusion that the entire "annulment" clause is lawful, for the reasons expressed *infra*. Therefore, I hold that the removal of Rose-Phoenix and its employees, in accordance with that clause, does not violate Section 8(a)(3) or 8(b)(2) of the Act. *Local 357, International Brotherhood of Teamsters* v. *N.L.R.B.*, 365 U.S. 667, *International Brotherhood of Electrical Workers, Local 11 (T. A. Thornburgh Co.)*, 153 NLRB No. 67.

the subcontracting clause is protected by the construction industry proviso to Section 8(e). I cannot agree, however, that the termination clause in support thereof falls outside the protection of the proviso, or that the threat to invoke the contractual right to terminate the collective-bargaining agreement constituted economic pressure prohibited by 8(b)(4)(B).

The majority holds that the right of termination is a form of economic pressure or self-help available to force compliance with the "protected" subcontracting clause and that, therefore, the termination clause exceeds the bounds of the construction industry proviso. In so holding, the majority places principal reliance on its conclusion that the termination of the collective-bargaining agreement between Respondents would work severe economic hardship on Respondent Ets-Hokin because other contractors who wish to live up to their no-subcontracting agreements with IBEW would not subcontract work to Ets-Hokin, and upon the Ninth Circuit's conclusion in the *Amalgamated Lithographers* case[20] that the termination clause there involved was, in the circumstances of that case, the equivalent of an agreement that the contracting union could employ a strike as "an ultimate sanction" in enforcing its contract.

For the reasons stated in my dissents in the *Greater Muskegon* and *Carvel* cases,[21] I disagree with the majority's conclusion that the contractual reservation of the right to take economic action to enforce a lawful no-subcontracting clause is itself violative of Section 8(e) of the Act. It seems anomalous to find, as does the majority, that the incorporation of the so-called self-help provision in the clause at issue

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[20] *N.L.R.B. v. Amalgamated Lithographers of America (Ind.)*, 309 F.2d 31.

[21] *Greater Muskegon General Contractors Association (Muskegon Bricklayers Union #5)*, 152 NLRB No. 38, *Local 217, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U. S. and Canada, AFL-CIO (The Carvel Co.)*, 152 NLRB No. 166.

herein operates lawfully to prohibit the employer from subcontracting to nonunion subcontractors, even though the self-help provision itself violates Section 8(e).[22]

That the majority's construction of the clause and of 8(e) is unwarrented seems clear upon a reading of the entire decision of the Ninth Circuit in the *Amalgamated Lithographers case.* In that decision, the Court, though construing a termination clause in conjunction with a lawful "chain shop" clause as an agreement by the primary employer "to a strike as an ultimate sanction" if it breached the "chain shop" clause, stated:

> But the fact that a strike or other coercive activity of the kind described in section 8(b)(4) is for an objective there made unlawful does not of itself render unlawful a contract whereby the employer agrees to voluntarily act in such a manner as would accomplish such an objective. This was settled in *Local 1976, United Brotherhood of Carpenters and Joiners of America* v. *N.L.R.B.*, 357 U.S. 93.
>
> It follows that if the chain shop clause is unlawful it must be because some provision of the Act other than section 8(b)(4)(A) and (B) make it so.

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[22] Were I to agree with the majority that the contractural right of termination constitutes "economic pressure" and places the clause outside the protection of the proviso to 8(e), I would, perforce, find the entire clause invalid. The clause in issue operates as a restriction on the employer's right to subcontract soley by virtue of the fact that the IBEW has the right to cancel its entire agreement if the employer subcontracts work to subcontractors who do not have agreements with appropriate IBEW Locals. The entire clause constitutes an implied agreement not to subcontract to such subcontractors. The two parts of the clause are not severable. The majority is rewriting the parties' contract to the extent it finds that a restriction on subcontracting survives its striking down of the termination provision. Surely, if it is true as the majority states, and as I agree, that our function is not to administer the law of private contracts, it is all the more true that our function does not include rewriting contracts of the parties. *Employing Lithographers of Greater Miami Florida* v. *N.L.R.B.*, 301 F.2d, 20, 28, enforcing 130 NLRB 968, as modified in pertinent part.

Though the Court nevertheless affirmed the Board's conclusion that the "termination" clause violated 8(e), it did so because that clause could be invoked not only for the Employer's breach of the lawful "chain shop" clause but also if the employer requested its employees to perform "'any' work received from or destined for any employer involved in a strike or lockout . . . whether such work was 'customer' or 'farmed out' work." Thus, the basis for the finding of illegality was that the termination clause itself constituted an implied agreement requiring the employer to cease doing business with certain other employers in violation of Section 8(e). Though the instant termination clause may be, indeed must be, construed as an implied agreement that Ets-Hokin will not subcontract to "non-union" subcontractors, such an agreement is permissible in the building and construction industry.

In view of the foregoing, I should think that this case is governed by the rule established by the Board in *Amalgamated Lithographers of America (Miami)*, 130 NLRB 968, 977. In dealing with a similar termination clause there, the Board stated as follows:

> As we have found that the "struck work" clause is lawful, the "right to terminate" clause intended to give the Union a remedy for the breach of the former is equally lawful. However, the "refusal to handle" clause is unlawful because it is intended to implement not only the lawful "chain shop" clause but also the unlawful "trade shop" clause.

Unless the majority, despite its disclaimer, is now overruling that doctrine, *sub silentio*, I fail to see why the same test, which would require a finding that the termination clause herein is lawful, is not applied in the instant case. The clear import of the Board's holding, quoted above, is that a termination clause is lawful whenever the clause

which it supports is lawful, and it is wholly immaterial whether the latter clause is lawful because it is primary in nature or because it falls within the construction industry proviso and is thus excepted from the prohibition of Section 8(e).

Moreover, the majority stretches the type of coercion prohibited under Section 8(b)(4) beyond the limits intended by the Congress and interpreted judicially. To label the right of termination a form of unlawful economic pressure is to beg the issue, rather than to answer it. The issue which must be resolved is whether the contractual right of termination or recission is a prohibited form of coercion under Section 8(b)(4). In *Sheet Metal Workers* v. *Hardy Corporation*, 332 F.2d 682 (C.A. 5, 1964), the court dealt with and rejected the contention that judicial enforcement of a subcontracting clause, which was protected by the construction industry proviso to Section 8(e), amounted to coercion as that term is used in the Act. The court stated, *inter alia:*

> We believe that the Congress used "coerce" in the section under consideration as a word of art, and that it means no more than nonjudicial acts of a compelling or restraining nature, applied by way of concerted self help consisting of a strike, picketing or other economic retaliation or pressure in a background of a labor dispute.[23]

The court buttressed its conclusion with an examination of portions of the legislative history of the 1959 amendments to the Act. Those references, and particularly the quoted language from the Supreme Court's *Sand Door*[24] decision, are equally applicable in the instant context.

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[23] 332 F.2d at 686.

[24] *United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 108.

Thus, the controlling distinction is that between economic action, such as strikes, picketing, and other related conduct, on the one hand, and resort to recognized legal or judicial remedies for breach of contract on the other.[25] Clearly, the IBEW lawfully could have filed suit for damages or specific performance for the breach of its agreement and, if the latter were ordered, obtained precisely the same result as it did herein. But another, long-accepted, remedy is available to a party to a contract when the other party commits a material breach of that contract. That remedy is the right to rescind the contract. As stated in *Corpus Juris Secundum*, "On a material breach of the contract the injured party may elect to rescind the contract or to stand on it."[26] Certainly the articulation within the contract of this lawful right of election of remedies should not have the anomalous effect of rendering unlawful the exercise of that right, particularly where there is not the slightest evidence that the Congress, having granted specific contractual rights to employers and unions in the construction industry, then intended to deprive the parties to such agreements of the well-established remedies for breach of those very rights. I would find that the election of this remedy, like that of seeking judicial enforcement, is a lawful form of action and not a prohibited act of coercion under Section 8(b)(4).

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[25] The references to the legislative history cited by the court in *Hardy, supra*, prove convincingly that the "other economic retaliation or pressure" mentioned by the court is that which is akin to the "strike" or "picketing" referred to immediately before the quoted phrase in the court's opinion. As noted above, the majority apparently accepts IBEW's statement that the economic pressures involved herein are not those flowing from a refusal of IBEW members to work without a contract, but are those resulting from the refusal of other contractors who have no-subcontracting agreements with the IBEW to give work to Ets-Hokin in such circumstances. Therefore, the emphasis placed upon the quoted phrase by the majority in support of its position would appear to be mistaken.

[26] 17A C.J.S. *Contracts*, Section 422(1), page 521 (1963). See also Williston on Contracts, Third Edition, Sections 683, 893A.

Finally, the majority's conclusion cannot be supported on the theory that termination of the contract will be followed by a strike or picketing; a "no contract—no work" theory. The record herein will not sustain a finding that the termination threat included a threat to withdraw men or to picket Ets-Hokin. Indeed, the Trial Examiner was quite careful to refrain from making any such finding.[27] And, while these events could occur or could be thought likely to occur, such supposition will not satisfy the General Counsel's burden of proving they did occur or were actually threatened.

For the foregoing reasons, I would hold the termination clause in the IBEW-Ets-Hokin contracts and the Respondent Unions' threats to invoke that clause lawful.

Dated, Washington, D. C.

JOHN H. FANNING, *Member*

NATIONAL LABOR RELATIONS BOARD

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[27] Trial Examiner's Decision, footnote 9, at page 14.

APPENDIX C

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. § 151, *et seq.*), are as follows:

* * * * *

UNFAIR LABOR PRACTICES

* * * * *

Section 8. (b) [29 U.S.C. § 158(b)] It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

Section 8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . .

* * * * *